A

YAP CHIN CHAI

v.

PP

B

COURT OF APPEAL, PUTRAJAYA
SURIYADI HALIM OMAR JCA
HASAN LAH JCA
AHMAD MAAROP JCA
[CRIMINAL APPEAL NO: B-05-44-2005]

C

10 DECEMBER 2009

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in cannabis - Possession - Whether proved - Whether appellant had custody and control of drugs - Whether invocation of presumption of trafficking premature and untenable - Dangerous Drugs Act 1952, s. 37(da)*

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This was an appeal by the appellant against the High Court's decision convicting him under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') and sentencing him to death. The prosecution sought to prove the appellant guilty of drug trafficking, by adducing evidence that he was in possession of 246.8 grams of methamphetamine (7 grams of methamphetamine was discovered in the toilet of the house and 239.8 grams in two tins that were recovered from the bedroom shared by the appellant and his wife) and in order to successfully establish the ingredient of trafficking, by invoking the statutory presumption under s. 37(da) of the Act. The learned judge decided that the prosecution had established a *prima facie* case. In his defence, the appellant alleged that SP5 did not see him carry anything with him when he rushed into the bathroom, where parts of the drugs that formed the subject matter of the charge were recovered. He alleged that the drugs were recovered with neither his assistance nor his wife. He further ventilated that there must be some evidence to show that he was guilty of the act of trafficking, of which there was none here. Further, in order to rely on the statutory presumption, it was incumbent upon the prosecution to prove that he was in actual possession of the drugs in question as per the charge. Further, the prosecution had failed to prove exclusivity of possession of the said drugs, by reason of his wife being equally present and living in the same premises, and having equal access to the room where a substantial part of the

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drugs were recovered. The learned judge, however, had accepted SP5's testimony, in that the appellant had in his possession the drugs recovered from the toilet bowl and that recovered from the two tins in the bedroom. The conduct of the appellant rushing into the bathroom and throwing some incriminating substance into the toilet bowl implied that he had knowledge of the drugs and the nature thereof. The learned judge concluded that the defence was one of mere denial, with him shifting the blame to his wife. The learned judge explained further that having established beyond reasonable doubt that the appellant had in his possession the drugs, what with the invocation of sub-s. (da) of s. 37 of the Act left unrebutted, he thus had failed to create any reasonable doubt over the prosecution's case. The learned judge then found him guilty of the charge and convicted him.

Held (allowing the appeal and setting aside the High Court order) Per Suriyadi Halim Omar JCA delivering the judgment of the court:

(1) SP5 never said he saw the appellant carrying anything when going to the bathroom, let alone throwing anything into the toilet bowl. In fact, it was not the case for the prosecution that the appellant was seen throwing something into the toilet bowl. The appellant when testifying, denied carrying anything into the toilet. However, the learned judge had written that he was ' ... of the view that the conduct of the accused rushing into the bathroom and throwing some of the incriminating substance into the toilet bowl implied that the accused had knowledge of the drugs ...' . This was an obvious error and serious misdirection, which had influenced the decision of the learned judge as regards knowledge, bearing in mind that there was not an iota of evidence of that overt act. Without that mistaken assessment of the evidence, the learned judge surely would not have arrived at that finding of knowledge and guilt. Not to give the benefit of the doubt in the circumstances to the appellant here would militate against established precepts. (paras 20 & 21)

(2) The charge read of trafficking 246.8 grams of methamphetamine. These drugs came from two sources *viz* the toilet bowl and from the bedroom occupied by the appellant and his wife. For purposes of the charge, the drugs were lumped together even though found at two different places. It was incontrovertible that the drugs from the toilet bowl only amounted to 7 grams. If

A the appellant had been charged only for that meagre amount for trafficking of drugs, the presumption section under s. 37(da)(xvi) of the Act would have been inapplicable, as this provision required 50 grams or more in weight of methamphetamine before any invocation was permitted. By
B lumping the drugs together, now that the sum total had exceeded 50 grams, the presumption evidential provision thus could be exploited by the prosecution. Any failure to establish exclusivity of possession of any part of the 246.8 grams by the prosecution, be it over the seven grams or the 239.8, would be
C fatal for the prosecution's case. As regards the seven grams of methamphetamine, as there was a serious misdirection by the learned judge, and with the benefit of the doubt granted to the appellant, the prosecution had started off on shaky grounds. (paras 22 & 23)

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(3) The balance *ie*, of 239.8 grams of methamphetamine, was recovered from the bedroom inhabited by the appellant and his wife. There was no evidence to show that there was no free access to the house and bedroom in which those drugs were
E found; and the prosecution had never proved that the appellant had exclusive use and occupation over that room. The appellant canvassed that the prosecution had not even proved custody or control of the drugs separately, either that from the toilet or bedroom, let alone possession of any of them. He was never
F caught red-handed with any container in hand, containing any of that deleterious substance. His misfortune was for being detained in a family home with three other members of his family in which drugs were recovered. His wife or his 18 year old child could easily have had custody and control of the two
G tins which contained the drugs. These two people were real persons and not fictitious personalities conjured by the appellant in order to extricate himself from the charge. He was not prevented from pushing the blame on them if that explanation raised a reasonable doubt as to his guilt. From the totality of
H the evidence, the prosecution must be found to have failed to establish that the appellant had custody and control of the two tins, which contained the 239.8 grams of drugs. (paras 24, 25 & 26)

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(4) There was not a shred of evidence adduced by the prosecution, which could establish or even indicate that there was something in the appellant's conduct construable as showing knowledge of the 239.8 grams of drugs in the bedroom. The question of degree of proof required to establish evidence of conduct thus did not arise here, as he simply had not exhibited or indicated sufficiently anything to show that 'he must have known what it was.' The suggestion that the alleged solitary conduct of running into the toilet was sufficient to hold that the appellant had possession of the drugs in the bedroom could not be accepted. That conduct at best could only infer knowledge of the drugs in the toilet and no more. By no account in a capital punishment case was this court willing to accept that the prosecution had established beyond reasonable doubt that the appellant had possession of the impugned drugs only on inferential evidence. (para 28)

(5) The fact that in that room was recovered the wife's bankbook, must *prima facie* mean that she had access to that room too. It was undeniable too that the wife was present in the house at the time of the raid, with the appellant being arrested in the toilet, and not in the room. In fact, she was also arrested for 12 days as a suspect and remanded for some time. Due to her equal conjugal rights to the bedroom, the prosecution could equally have charged her for the offence of trafficking over the 239.8 grams of methamphetamine rather than the appellant, if not for her untimely death *(Lee Chee Meng v. PP*). It could not be said that the prosecution had proven beyond reasonable doubt that the appellant had knowledge of the drugs in the bedroom. (paras 29 & 30)

(6) By the failure to establish possession, let alone affirmative possession first, the invocation of the presumption of trafficking was premature and untenable. Bearing in mind that the drugs were kept in the two tins, and passive possession being a viable defence, the prosecution was likewise doomed to fail to establish any overt act of trafficking. The court thus should have held, after a maximum evaluation, that the case of the prosecution had been rebutted, thus raising a reasonable doubt over it. (paras 31 & 32)

Bahasa Malaysia *Translation Of Headnotes*

Ini adalah rayuan oleh perayu terhadap keputusan Mahkamah Tinggi menyabit perayu di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta tersebut') dan menjatuhkan hukuman mati. Pihak pendakwaan cuba membuktikan bahawa perayu telah melakukan kesalahan pengedaran dadah, dengan mengemukakan keterangan bahawa beliau mempunyai milikan 246.8 gram methamphetamine (7 gram methamphetamine dijumpai di dalam jamban tandas dan 239.8 gram dalam dua tin yang dijumpai di dalam bilik tidur yang dikongsi oleh perayu dan isterinya) dan untuk membuktikan ingredian pengedaran, dengan menggunakan anggapan statutori mengedar di bawah s. 37(da) Akta. Hakim bijaksana telah memutuskan bahawa pihak pendakwaan telah membuktikan kes *prima facie*. Dalam pembelaannya, perayu berhujah bahawa SP5 tidak melihat beliau membawa apa-apa apabila beliau lari masuk ke dalam tandas, di mana sebahagian dadah-dadah yang menjadi halperkara tuduhan dijumpai. Beliau berhujah bahawa dadah-dadah tersebut dijumpai tanpa bantuan dirinya atau isterinya. Beliau terus menyatakan bahawa perlu adanya keterangan yang menunjukkan bahawa beliau telah melakukan kesalahan pengedaran dadah, tetapi di dalam kes ini tidak timbul sesuatu pun. Seterusnya, untuk bersandarkan atas anggapan statutori, ia adalah wajib bagi pihak pendakwaan membuktikan bahawa perayu mempunyai milikan ke atas dadah-dadah tersebut seperti di dalam pertuduhan. Seterusnya, pihak pendakwaan telah gagal membuktikan perayu mempunyai eksklusiviti milikan ke atas dadah-dadah tersebut, atas alasan bahawa isterinya juga tinggal di rumah itu, dan mempunyai akses yang sama ke bilik tidur mereka di mana sebahagian besar dadah-dadah ditemui. Hakim bijaksana telah menerima testimoni SP5, bahawa perayu mempunyai milikan ke atas dadah-dadah tersebut yang dijumpai di dalam jamban tandas dan di dalam dua tin di bilik tidur. Tindakan perayu berlari ke dalam tandas dan membuang bahan-bahan yang mampu menjadikannya bersalah secara tersirat menunjukkan bahawa perayu mempunyai pengetahuan mengenai dadah-dadah tersebut. Hakim bijaksana membuat kesimpulan bahawa pembelaan merupakan satu penafian, dan mempersalahkan isterinya, yang juga penghuni bilik tidur, di mana sebahagian substantial dadah-dadah tersebut dijumpai. Hakim bijaksana menyatakan seterusnya bahawa dengan pembuktian melampaui keraguan yang munasabah bahawa perayu mempunyai

milikan dadah, dengan penggunaan sub-s. 37(da) Akta yang tidak dipatahkan, beliau gagal membangkitkan keraguan munasabah ke atas kes pendakwaan. Oleh itu, hakim bijaksana memutuskan bahawa perayu bersalah atas pertuduhan dan menyabit perayu.

Diputuskan (membenarkan rayuan dan mengenepikan perintah Mahkamah Tinggi)
Oleh Suriyadi Halim Omar HMR menyampaikan penghakiman mahkamah:

(1) SP5 tidak menyatakan bahawa dia melihat perayu membawa apa-apa apabila perayu memasuki tandas dengan tergesa-gesa, apatah lagi membuang apa-apa ke dalam jamban tandas. Ia bukanlah kes pihak pendakwaan bahawa perayu dilihat membuang apa-apa ke dalam jamban tandas. Perayu, apabila memberi keterangan, menafikan bahawa beliau telah membawa apa-apa ke dalam tandas. Hakim bijaksana telah menulis bahawa beliau ... 'berpendapat bahawa tindakan tertuduh yang lari tergesa-gesa ke dalam tandas dan membuang bahan-bahan yang mampu membuatnya bersalah ke dalam jamban tandas secara tersirat menunjukkan bahawa perayu mempunyai pengetahuan mengenai dadah-dadah tersebut ...' . Ini adalah kesalahan yang nyata dan satu salah arahan yang serius, yang telah mempengaruhi keputusan hakim bijaksana mengenai pengetahuan, dan perlu diingatkan bahawa tidak terdapat sekelumit pun keterangan mengenai perbuatan tidak berselindung tersebut. Tanpa penilaian keterangan yang salah, hakim bijaksana tidak akan membuat kesimpulan bahawa wujudnya pengetahuan dan kesalahan. Kegagalan memberi faedah kesangsian di dalam keadaan sedia ada kepada perayu melemahkan ajaran yang sudah wujud.

(2) Pertuduhan mengenai pengedaran 246.8 gram methamphetamine. Dadah-dadah tersebut datangnya dari dua sumber iaitu jamban tandas dan dari bilik tidur yang diduduki oleh perayu dan isterinya. Untuk tujuan pertuduhan tersebut, dadah-dadah tersebut digabungkan walaupun dijumpai di kawasan-kawasan yang berlainan. Ia adalah jelas bahawa dadah-dadah dari jamban tandas hanya 7 gram. Jika perayu dituduh hanya untuk amaun sekecil itu untuk pengedaran dadah, anggapan seksyen di bawah s. 37(da)(xvi) Akta tersebut tidak boleh digunapakai, kerana peruntukan ini memerlukan keberatan methamphetamine 50 gram atau lebih sebelum penggunaan dibenarkan. Dengan

menggabungkan dadah-dadah tersebut, dan ia telah melebihi 50 gram, anggapan keterangan peruntukan boleh dieksploitkan oleh pihak pendakwaan. Kegagalan untuk membuktikan eksklusiviti milikan apa-apa bahagian dari 246.8 gram oleh pihak pendakwaan, yang melebihi 7 gram atau 239.8 gram, adalah fatal untuk kes pendakwaan. Mengenai 7 gram methamphetamine, kerana wujudnya salah arahan yang serius oleh hakim bijaksana, dan dengan faedah kesangsian yang diberi oleh perayu, pihak pendakwaan telah bermula dengan kegoncangan.

(3) Baki iaitu 239.8 gram methamphetamine, dijumpai di dalam bilik tidur yang diduduki oleh perayu dan isterinya. Tiada keterangan yang menunjukkan bahawa tiada wujudnya akses bebas ke rumah dan bilik tidur di mana dadah-dadah tersebut dijumpai; dan pihak pendakwaan tidak membuktikan bahawa perayu menduduki dan mengguna bilik tersebut secara eksklusif. Perayu berhujah bahawa pihak pendakwaan tidak membuktikan jagaan dan kawalan dadah-dadah tersebut secara berasingan, dari tandas atau dari bilik tidur, apatah lagi milikan ke atas dadah-dadah tersebut. Perayu tidak pernah ditangkap dengan bungkusan di dalam tangannya, yang mengandungi dadah-dadah tersebut. Perayu kurang nasib baik kerana ditangkap di dalam rumah yang dikongsi dengan ahli-ahli keluarga yang lain di mana dadah-dadah ditemui. Isteri perayu dan anaknya yang berumur 18 tahun berkemungkinan mempunyai jagaan dan kawalan ke atas tin-tin yang mengandungi dadah-dadah tersebut. Kedua-dua orang ini wujud dan bukan rekaan semata-mata yang direka oleh perayu untuk melepaskan dirinya dari pertuduhan tersebut. Perayu tidak dihalang dari mempersalahkan mereka jika ia boleh membangkitkan keraguan munasabah mengenai kesalahannya. Dari keseluruhan keterangan, pihak pendakwa didapati gagal membuktikan bahawa perayu mempunyai jagaan dan kawalan ke atas tin-tin tersebut, yang mengandungi 239.8 gram dadah-dadah.

(4) Tiada keterangan yang dikemukakan oleh pihak pendakwa, yang boleh membuktikan atau menunjukkan bahawa ada sesuatu di dalam kelakuan perayu yang menunjukkan pengetahuan mengenai 239.8 gram dadah-dadah di dalam bilik tidur. Persoalan tahap pembuktian yang diperlukan untuk membuktikan keterangan kelakuan tidak timbul di sini, kerana

perayu tidak mempamerkan atau menunjukkan apa-apa yang 'beliau mesti mengetahui mengenainya'. Cadangan bahawa kelakuan perayu berlari tergesa-gesa ke dalam tandas adalah mencukupi untuk memutuskan bahawa perayu mempunyai milikan dadah-dadah di dalam bilik tidur tidak boleh diterima. Perbuatan tersebut hanya boleh memberi kesimpulan pengetahuan dadah-dadah di dalam jamban tandas dan tidak lebih dari itu. Mahkamah enggan menerima bahawa pihak pendakwaan telah membuktikan kesnya di luar keraguan munasabah yang perayu mempunyai milikan dadah-dadah tersebut berdasarkan keterangan boleh diandaikan di dalam kes yang melibatkan hukuman mati.

(5) Fakta bahawa di dalam bilik tersebut terdapat buku bank isteri perayu, mesti *prima facie* bermaksud isterinya mempunyai akses ke bilik tersebut. Tidak boleh dinafikan bahawa isteri perayu hadir di dalam rumah pada masa serbuan dijalankan, dengan perayu ditangkap di tandas, dan bukan di dalam bilik tidur. Isteri perayu juga ditangkap selama 12 hari sebagai suspek dan direman untuk jangkamasa yang tertentu. Disebabkan isteri perayu mempunyai hak suami isteri ke atas bilik tidur tersebut, pihak pendakwaan boleh membawa pertuduhan kesalahan pengedaran dadah 239.8 gram methamphetamine tersebut ke atasnya selain dari perayu, kalau bukan kerana kematian mengejut isteri perayu *(Lee Chee Meng v. PP)*. Tidak boleh dikatakan bahawa pihak pendakwaan telah membuktikan kesnya di luar keraguan munasabah bahawa perayu mempunyai pengetahuan mengenai dadah-dadah yang dijumpai di dalam bilik tidur tersebut.

(6) Dengan kegagalan membuktikan milikan, apatah lagi milikan afirmatif pertama, penggunaan anggapan pengedaran adalah pramasa dan tidak dapat diterima. Mengambilkira dadah-dadah disimpan di dalam dua tin, dan milikan pasif adalah pembelaan viable, pihak pendakwaan sememangnya gagal membuktikan perlakuan tidak berselindung seperti pengedaran. Mahkamah sepatutnya memutuskan, selepas penilaian maksimum, bahawa kes pendakwaan telah disangkal, oleh itu telah membangkitkan keraguan munasabah ke atasnya.

Case(s) referred to:
Chan Pean Leon v. PP [1956] 1 LNS 17 HC ***(refd)***
Choo Yoke Choy v. PP [1992] 4 CLJ 1791; [1992] 1 CLJ (Rep) 43 SC ***(refd)***
Lee Chee Meng v. PP [1992] 1 CLJ 345; [1992] 1 CLJ (Rep) 168 HC ***(refd)***
Mat v. PP [1963] 1 LNS 82 HC ***(refd)***
Mohamad Radhi Yaakob v. PP [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311 SC ***(refd)***
Mohamed Mokhtar v. PP [1971] 1 LNS 84 HC ***(refd)***
Mohd Zaiham Mislan v. PP [2010] 1 CLJ 1 FC ***(refd)***
Warner v. Metropolitan Police Commissioner [1968] 2 All ER 356 ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 37(da)(xvi), 39B(1)(a)

For the appellant - Gurbachan Singh Bagawan Singh; M/s Bachan & Kartar
For the respondent - Samihah Rhazali; AG's Chambers

[Appeal from High Court, Shah Alam; Criminal Trial No: 47-14-2000]

Reported by Suhainah Wahiduddin

JUDGMENT

Suriyadi Halim Omar JCA:

[1] This is an appeal by the appellant against the High Court's decision on 27 April 2005 convicting him under s. 39B(1)(a) of the Dangerous Drugs Act 1952 (the Act) and sentencing him to death. It was pursuant to his notice of appeal that we heard this appeal.

[2] The charge reads as follows:

> Bahawa kamu, pada 24 Mac 2000, jam lebih kurang 3.00 ptg di rumah no.60, Jalan Permata 15, Taman Yayasan, Sg. Jarom di dalam daerah Kuala Langat di dalam Negeri Selangor Darul Ehsan,telah memperedarkan dadah berbahaya, iaitu 246.8 gram Methamphetamine dan oleh yang demikian, kamu telah melakukan suatu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya, 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

[3] The prosecution sought to prove the appellant guilty of drugs trafficking, by adducing evidence that he was in possession of 246.8 grams of methamphetamine at the abovementioned house, and in

order to successfully establish the ingredient of trafficking, by invoking the statutory presumption under s. 37(da) of the Act. The prosecution called 10 witnesses to prove its case, and at the defence stage, the appellant elected to give evidence on oath.

Facts Of The Case

[4] At about 12.30pm on 24.3.2000, acting on information, SP5 C/Insp. Chia Aik Chin, the raiding officer, together with seven other police officers went to Banting. Upon arrival at the targeted premise, he found the grill of the front door padlocked from outside. Behind the grill was a wooden door, which was then successfully open. He called out "police" but failed to receive any response. He then directed D/Kpl Ghazali to force open the padlock as it locked the grill. He thereafter unlocked the grill door. At that stage he heard movements inside the house. He rushed up the staircase leading to the first floor and saw a Chinese woman seated on a chair near the staircase. At the same time he saw a male Chinese ie, the appellant rushing out of the room into a nearby bathroom.

[5] He followed him and rushed into the bathroom and there saw the appellant standing next to the toilet bowl. He then conducted a search within sight of the appellant after directing him to stand just outside the door of the bathroom, with D/L Jumiat standing guard. Using his hand, he scooped up three plastic packets containing white crystal-like substance from the toilet bowl, and thereafter put all the recovered substance into a transparent plastic bag. He then brought the appellant and the Chinese woman into the bedroom and conducted a search. He recovered and seized a big plastic packet and two smaller plastic packets containing crystal-like substance suspected to be drugs in two tins. He then conducted a search of the room and recovered a Malaysian passport bearing the appellant's name and a Malayan Banking bankbook under the name of Lee Lai Moey.

[6] SP5 then brought the appellant and that Chinese lady, by then known to be Lee Lai Moey, together with the exhibits, to IPD Kuala Langat and handed them over to the investigating officer at about 8.45pm. SP4 ie, Chong Yong Kiong, a Government Chemist testified that he analyzed the contents of the plastic packets. The appellant never challenged the contents of the plastic packet. After carrying out several tests SP4 found on analysis that

A the seven plastic packets contained 239.8 grams of methamphetamine. With regard to other plastic packets, on analysis, it was analysed to contain 7.0 grams of methamphetamine. Jumping the gun slightly, the 7 grams of methamphetamine were recovered in the toilet whilst the 239.8 grams in the two tins recovered from the bedroom.

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[7] After completing the analysis of the exhibits, the exhibits were returned to SP9 ie, Insp. Mohd Rashidi Richard Abdullah, together with the prepared report. The latter had testified that on 24 March 2000 at about 7.35pm he was informed of an arrest effected by SP5 and his raiding party. At about 8.45pm, SP5 handed over to him the C exhibits, which he had recovered together with the filed report. SP5 also had handed over to him the appellant and the Chinese woman named Lee Lai Moey.

[8] SP9 then instructed L/Kpl. Aziz to take photographs of the D recovered exhibits. The exhibits were, throughout, under his custody and kept under lock and key in his cabinet. He took steps to seal the big plastic bag whilst the small plastic packets were placed in an envelope, which he then sealed. He handed the exhibits to the exhibits' storekeeper where they were kept for safekeeping.

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[9] SP9 then went to the house where the arrest took place, drew a sketch plan, and directed L/Kpl Aziz to take photographs. On 27 March 2000, he took the exhibits out of the exhibits' storeroom in order to send them to Bukit Aman for finger printing. He took F back the exhibits on 28 March 2000 at about 11.30am. The envelope in which the exhibits were kept were sealed and thereafter handed to SP4. On 11 May 2000 at about 10am, he went to the Jabatan Kimia to retrieve the exhibits from SP4, together with the chemist report. He then returned the exhibits to the exhibits' G storeroom.

[10] Based on these facts the learned judge decided that the prosecution had established a *prima facie* case.

H **Defence Case**

[11] The appellant testified that he had raised a reasonable doubt in the prosecution's case. He alleged that SP5 did not see him carry anything with him when he entered the bathroom, where parts of the drugs that formed the subject matter of the charge were I recovered. He alleged that the drugs were recovered with neither his

assistance nor his wife. He further ventilated that there must be some evidence to show that he was guilty of the act of trafficking, of which there was none here.

[12] Further, in order to rely on the statutory presumption, it was incumbent upon the prosecution to prove that he was in actual possession of the drugs in question as per the charge. He asserted that the drugs recovered were not on the basis of an actual possession but based on "presumed possession", merely by reason of the drugs being found in the house occupied by him.

[13] Further the prosecution had failed to prove exclusivity of possession of the said drugs, by reason of his wife being equally present and living in the same premises, and having equal access to the room where a substantial part of the drugs were recovered.

The Learned Judge's Views

[14] By calling the defence the learned judge thus at the end of the prosecution's case had accepted SP5's testimony. She found that there was corroboration by SP7, in that the appellant had in his possession the drugs recovered from the toilet bowl and that recovered from the two tins in the bedroom. The conduct of the appellant rushing into the bathroom and throwing some incriminating substance into the toilet bowl implied that he had knowledge of the drugs and the nature thereof.

[15] The learned judge then alluded to s. 37(da) of the DDA 1952, whereby a person in possession of 50 grams of methamphetamine would attract the statutory presumption of trafficking. A *prima facie* case thus had been made out against the appellant and thus called upon him to enter his defence. At the close of the defence story, the court held that the appellant had failed to rebut the prosecution's case. The learned judge found that the house raided, was rented by the accused, and he lived there together with his wife and children. He was also the head of the family. The court accepted the fact that the evidence adduced showed that the drugs recovered were not from one place but from two areas of the said house *viz* the toilet and the bedroom.

[16] Apart from the above factual finding, the learned judge had also accepted that as regards the drugs found in the toilet bowl, in which the accused was seen to have hurriedly entered, was accessible to the appellant's family. The very conduct of rushing

into the bathroom and throwing the drugs into the toilet bowl, on becoming aware of the police presence was consistent with knowledge and guilt. The learned judge also remarked that the officers who conducted the raid at the appellant's house were complete strangers to him and there was no suggestion of a frame-up. There appeared to be no reason for the police officers who conducted the raid to single him out and pin upon him a serious charge.

[17] The learned judge concluded that the defence was one of mere denial, with him shifting the blame to his wife, who was also an occupant of the bedroom, where a substantial part of the drugs was recovered. The learned judge explained further that having established beyond reasonable doubt that the appellant had in his possession the drugs, what with the invocation of sub-s. (da) of s. 37 of the Act left unrebutted he thus had failed to create any reasonable doubt over the prosecution's case. The learned judge then found him guilty of the charge and convicted him. As required by law the learned judge sentenced him to death.

Decision Of This Panel

[18] At the conclusion of the appeal, this panel allowed it and set aside the High Court order. To appreciate why we made such an order, it is necessary to discuss the grounds of judgment of the learned judge especially that was prejudicial to the appellant, which amounted to a serious misdirection. To appreciate the last remark we need to reproduce SP5's evidence as per the notes of proceedings where he said:

> Saya telah berlari menuju ke tingkat atas supaya barang-barang kes tidak dilupuskan oleh suspek. Apabila sampai di pertengahan tangga saya nampak seorang perempuan Cina sedang duduk di atas kerusi berhampiran dengan tangga. Pada masa itu juga saya nampak seorang lelaki Cina telah menuju dengan laju dari bilik masuk ke bilik air.

[19] SP5 never said he saw the appellant carrying anything when going to the bathroom, let alone throwing anything into the toilet bowl. In fact it was not the case for the prosecution that the appellant was seen throwing something into the toilet bowl. The appellant when testifying, denied carrying anything into the toilet, and was adequately so submitted by his counsel. Yet at p. 141 of the Rekod Rayuan, the learned judge wrote:

> I was of the view that the conduct of the accused rushing into the bathroom and **throwing some of the incriminating substance into the toilet bowl** implies that the accused had knowledge of the drugs and the nature thereof ...

[20] This was an obvious error and a serious misdirection, which had influenced the decision of the learned judge as regards knowledge, bearing in mind that there was not an iota of evidence of that overt act. This misdirection led the learned judge to state:

> I am of the view that the conduct of the accused rushing into the bathroom and throwing the drugs into the toilet bowl upon becoming aware of the police presence is **very significant** and is consistent with knowledge and guilt (emphasis added).

[21] Without that mistaken assessment of the evidence, the learned judge surely would not have arrived at that finding of knowledge and guilt. Not to give the benefit of the doubt in the circumstances to the appellant here would militate against established precepts.

[22] We now touch on another issue. The charge reads of trafficking 246.8 grams of methamphetamine. These drugs came from two sources, *viz* the toilet bowl and from the bedroom occupied by the appellant and his wife. For purposes of the charge, the drugs were lumped together even though found at two different places. It was incontrovertible that the drugs from the toilet bowl only amounted to 7 grams. If the appellant had been charged only for that meagre amount for trafficking of drugs, the presumption section under s. 37(da)(xvi) of the Act would have been inapplicable, as this provision requires 50 grams or more in weight of methamphetamine before any invocation is permitted. By lumping the drugs together, now that the sum total had exceeded 50 grams, the presumption evidential provision thus could be exploited by the prosecution.

[23] Any failure to establish exclusivity of possession of any part of the 246.8 grams by the prosecution, be it over the 7 grams or the 239.8, would be fatal for the prosecution's case. As regards the 7 grams of methamphetamine, as there was a serious misdirection by the learned judge, and with the benefit of the doubt granted to the appellant, the prosecution had started off on shaky grounds.

[24] The balance ie, of 239.8 grams of methamphetamine, was recovered from the bedroom inhabited by the appellant and his wife. There was no evidence to show that there was no free access to the house and bedroom in which those drugs were found; and the prosecution had never proved that the appellant had exclusive use and occupation over that room. It was small wonder that the appellant canvassed that the prosecution had not even proved custody or control of the drugs separately, either that from the toilet or bedroom, let alone possession of any of them. In *Warner v. Metropolitan Police Commissioner* [1968] 2 All ER 356 Lord Wilberforce held that 'the starting point will be that the accused had physical control of something-a package, a bottle, a container-found to contain the substance". Here the facts do not reflect any of the possible circumstances. He was never caught red-handed with any container in hand, containing any of that deleterious substance. His misfortune was for being detained in a family home with three other members of his family in which drugs were recovered.

[25] From the totality of the facts, with:

i. the appellant seen running towards the toilet;

ii. no evidence being adduced as to his starting point;

iii. no evidence that he ran into the bedroom towards the 239.8 grams of drugs when the police were there;

iv. there being easy access to everyone to the bedroom;

v. the wife's bank book found in the bedroom;

vi. there being two other children in the house with one being 18 years old;

vii. the wife also living in the house, and being present at the material time;

viii. that bedroom being used as the conjugal room; and

ix. that he was never caught with the container in which the 239.8 grams were kept,

the wife or the 18 year old child could easily have had custody and control of the two tins which contained the drugs. These two people are real persons and not fictitious personalities conjured by the

appellant in order to extricate himself from the charge. However unpleasant it sounds, and even if the court were not to accept or believe his explanation, he is not prevented from pushing the blame on them if that explanation raises a reasonable doubt as to his guilt (*Mat v. PP* [1963] 1 LNS 82; *Mohamad Radhi Yaakob v. PP* [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311 SC).

[26] Compounded to the above, the panel had occasion to pose the question as to why the appellant had attempted to dispose a smaller amount of drugs in the toilet, when it would be more beneficial to prevent that bigger amount from falling into the hands of the police. Was it possible that he did not know that the two tins contained drugs? From the totality of the evidence, the prosecution must be found to have failed to establish that the appellant had custody and control of the two tins, which contained the 239.8 grams of drugs.

[27] Even if the prosecution could successfully establish custody and control of the containers in which the drugs were kept, establishing the ingredient of possession, which demands knowledge, is an insurmountable task here. In *Chan Pean Leon v. PP* [1956] 1 LNS 17, Thomson J said:

> Once possession is proved then before the accused person can be convicted it is necessary in addition to prove *mens rea* ... Here again knowledge cannot be proved by direct evidence, it can only be proved by inference from the surrounding circumstances ... There may be something in the accused's behaviour that shows knowledge, or the nature of the thing may be so obvious that it is possible to say "he must have known what it was" or, again in cases under the Dangerous Drugs Act, there may be a statutory presumption which fills a gap in the evidence. (As the prosecution attempted to establish possession by direct evidence, the latter evidential phrase is inapplicable here as the prosecution had invoked s. 37(da) of the Act to establish the ingredient of trafficking - *our remarks*).

[28] We are entitled to critically examine the evidence on matters involving question of facts, to determine whether the trial court was right in coming to a right factual finding or not (*Mohamed Mokhtar v. PP* [1971] 1 LNS 84 HC; *Mohd Zaiham Mislan v. PP* [2010] 1 CLJ 1). Regretfully for the prosecution there was not a shred of evidence adduced by it, which could establish or even indicate that

there was something in the appellant's conduct construable as showing knowledge of the 239.8 grams of drugs in the bedroom. The question of degree of proof required to establish evidence of conduct thus did not arise here, as he simply had not exhibited or indicated sufficiently anything to show that "he must have known what it was". We were unwilling to accept any suggestion that the alleged solitary conduct of running into the toilet was sufficient to hold that he had possession of the drugs in the bedroom as well. That conduct at best could only infer knowledge of the drugs in the toilet and no more. By no account in a capital punishment case was this panel willing to accept that the prosecution had established beyond reasonable doubt that the appellant had possession of the impugned drugs only on inferential evidence, premised on him being the head of the house and at that relevant time, sharing the bedroom with his wife.

[29] The fact that in that room was recovered the wife's bankbook, must *prima facie* mean that she had access to that room too. It was undeniable too that the wife was present in the house at the time of the raid, with the appellant being arrested in the toilet, and not in the room. In fact she was also arrested for 12 days as a suspect and remanded for some time. Due to her equal conjugal rights to the bedroom, the prosecution could equally have charged her for the offence of trafficking over the 239.8 grams of methamphetamine rather than the appellant, if not for her untimely death (*Lee Chee Meng v. PP* [1992] 1 CLJ 345; [1992] 1 CLJ (Rep) 168 HC).

[30] We were thus satisfied that it could not be said that the prosecution had proven beyond reasonable doubt that the appellant had knowledge of the drugs in the bedroom. At the risk of repeating, with such a failure to establish knowledge over the drugs in the bedroom, to lump them together with the drugs found in the toilet was fatal to the charge. Much dissertation was focused on what happened at the toilet but sadly lacking for the bedroom, despite that location being different, and suffering different circumstances (*Choo Yoke Choy v. PP* [1992] 4 CLJ 1791; [1992] 1 CLJ (Rep) 43 SC).

[31] By the failure to establish possession, let alone affirmative possession first, the invocation of the presumption of trafficking was premature and untenable.

[32] Bearing in mind that the drugs were kept in the two tins, and passive possession being a viable defence, the prosecution was likewise doomed to fail to establish any overt act of trafficking. The prosecution could not have successfully alleged that some third party was involved, as the locked gates *prima facie* indicated that no one had entered the premises when the police raided the appellant's home. In fact no non-family members were arrested there. The court thus should have held, after a maximum evaluation, that the case of the prosecution had been rebutted, thus raising a reasonable doubt over it.

[33] Grounded on the above reasons we had no hesitation in concluding that the appeal warranted our interference. We thereupon allowed the appeal.